76-502[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

MICHAEL J. BENNETT,

Petitioner,

v.

[redacted]

SECRETARY OF DEFENSE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Michael J. Bennett, respectfully prays that a writ of certiorari be allowed by this Court for review of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit for which review is sought is captioned Michael J. Bennett, Appellant, v. Secretary of Defense, No. 75-1606 (74-1033 Civil), filed on June 10, 1976, and printed as an appendix to this petition at page 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 2254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Michael J. Bennett, a U.S. citizen and substantial federal taxpayer, has standing to sue the Secretary of Defense for injunction and a declaratory judgment alleging an unconstitutional expenditure of federal funds extracted from him as taxes to provide military assistance to Israel, a theocracy based on an establishment of religion?

2. Whether such a lawsuit presents a nonjusticiable political question?

3. Whether the lower court erred in concluding said case is moot?

4. Whether the court below erred in not designating a three-judge court?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2282:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article I, § 8;

U.S. Constitution, First Amendment.

(See verified complaint and affidavit of Rabbi Berger, App. 2a.)

STATEMENT OF THE CASE

This case is based on a complaint for injunction and declaratory judgment, verified by Michael J. Bennett ("Bennett"), the plaintiff below, and including an affidavit of Rabbi Elmer Berger, an ordained rabbi, that Israel "is a theocracy based on an establishment of religion" because it imposes a religious test as a prerequisite to citizenship, against the Secretary of Defense ("Secretary"), defendant below, for expenditure of funds extracted from plaintiff as taxes for military assistance to Israel under the Emergency Assistance Act of 1973 in violation of the specific constitutional protection against Congress using the taxing

and spending clause in derogation of the Establishment and Free Exercise Clauses of the federal Constitution. (See verified complaint and affidavit of Rabbi Berger, App. 6a).

On April 25, 1975, Judge Gasch of the U.S. District Court for the District of Columbia filed a Memorandum-Order in which he held that (1) a three-judge court need not be convened because he lacked power to adjudicate the claim set forth in the Complaint, (2) plaintiff lacked standing under *Flast v. Cohen,* 392 U.S. 83 (1968), because plaintiff would not be able to show specific injury or an immediate danger thereof, (3) the case presented a "nonjusticiable political question which cannot be resolved by the Courts," and that since the complaint related to expenditure of appropriated funds only through June 30, 1974, the case was moot, and dismissed plaintiff's case on the above-stated grounds. (See App. 2a hereto.)

On June 10, 1976, the U.S. Court of Appeals for the District of Columbia Circuit entered a judgment affirming the judgment of the District Court on the basis of *Dickson v. Ford,* 521 F.2d 234 (5th Cir. 1975) (cert. den. 424 U.S. 954, 96 S. Ct. 1428). (Former decision, 419 U.S. 1085. Facts and Opinion, *Dickson v. Nixon,* 379 F. Supp. 1345; 521 F.2d 234.)

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Petitioner Bennett submits that there are special and important reasons within the meaning of Rule 19 of this Court for permitting a review on writ of certiorari in that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

1. The Court of Appeals did not address itself to the fundamental question of whether plaintiff had a statutory right to have a three-judge court convened in light of the fact that his complaint asked for an injunction. It affirmed the District Court's Memorandum-Order with the opinion solely on the grounds of *Dickson v. Ford,* 521 F.2d 234 (cert. den. 424 U.S. 954, 96 S. Ct. 1428), which in turn limited itself to the single grounds that the District Court did not have jurisdiction under Article III of the Constitution of a "nonjusticiable political question." In 28 U.S.C. 2282, Congress has not authorized a District Court to exercise jurisdiction over a case involving an injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States. Indeed, 28 U.S.C. 2282 provides in terms that *all* applications for such injunctions *must* be heard and determined by three judges under 28 U.S.C. 2284, and not by a district court. This Court should reaffirm the clear intention of Congress in 2282, and determine that the District Court in this case had no jurisdiction to dismiss a complaint for an injunction restraining the enforcement of an Act of Congress.

2. The Court of Appeals in affirming Judge Gasch's Memorandum-Order in the District Court clearly misapplied *Flast v. Cohen,* 392 U.S. 83 (1968), which is the supreme law of the land. Article VI, U.S. Constitution; *Cooper v. Aaron,* 358 U.S. 1 (1958). A reading of petitioner Bennett's verified complaint in the District Court, and the affidavit of Rabbi Berger thereto, indicates on its face that the claim asserted is squarely within the "test" this Court asserted in the *Flast* case. (392 U.S. at 103.)

3. The Court of Appeals in affirming the District Court's Memorandum-Order clearly disregarded the "political question"

test stated by this Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962). The elements to be considered are:

(a) a textually demonstrable constitutional commitment of the issue to a coordinate political department;

(b) lack of judicially discoverable and manageable standards for resolving it;

(c) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

(d) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;

(e) an unusual need for unquestioning adherence to a political decision already made;

(f) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

This Court said in the *Baker* case (369 U.S., at page 217):

> "Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no lawsuit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."

The District Court did not apply the "inextricable" formulations of the *Baker* case, and the Court of Appeals

disregarded that fundamental question of application of the "political question" standards enumerated in *Baker v. Carr, supra*, to cases falling within the ambit of justiciability and standing enunciated by this Court in *Flast v. Cohen, supra*.

4. The Court of Appeals in its judgment affirming the District Court's Memorandum-Order in this case did not pass upon the mootness issue. The complaint does not indicate that the case is moot, and such a determination would necessarily involve evidence and a consideration of actions taken by the Secretary of Defense in expending the $2.2 million appropriated by Public Law 93-199 (see complaint, Exhibit A attached thereto, App. 3a hereto), and the District Court, in dismissing petitioner Bennett's complaint below, obviously undertook to make speculative findings of fact respecting the mootness issue without having any evidence before it. This was entirely unlawful and should justify this Court in granting a writ of certiorari in this case in order to reexamine and reaffirm the principles set forth in *Conley v. Gibson*, 355 U.S. 41 (1957).

This Court said in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970):

> "We should remember that the cessation of illegal conduct does not make a case moot:
>
> > "A controversy may remain to be settled in such circumstances . . ., e.g., a dispute over the legality of the challenged practices . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practice settled, militates against a mootness conclusion.' United States v. W. T. Grant Co., 345 U.S. 629, 632."

At the very least, the question of mootness is one of fact that cannot be determined on a motion to dismiss and that question presents a special and important reason within the meaning of this Court's Rule 19 for permitting review on writ of certiorari.

CONCLUSION

The central issue in petitioner Bennett's case as set forth in his complaint in the District Court (App. 3a hereto) is *not* a "political question" challenging the President's authority in foreign relations or as Commander-in-Chief, or the authority of the Secretary of Defense insofar as he acts as the President's agent in carrying out Article II responsibilities. The Court of Appeals and the District Court have both rejected petitioner Bennett's right under *Flast v. Cohen, supra,* to challenge the power of Congress to expend his tax money to establish a religion in a foreign country. Even the President cannot constitutionally do that. His powers, and the powers of the Secretary of Defense, must stem from an Act of Congress or the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S. Ct. 863, 96 L.Ed. 1153 (1952). No Act of Congress or provision of the Constitution authorizes the President to spend a taxpayer's money to establish religion either within the United States or without the United States. The First Amendment specifically forbids it and no President or Secretary of Defense can shroud an unconstitutional action in the false plumage of "foreign affairs" and thereby make it a "political question" and therefore nonjusticiable. When President Nixon sought to cloak unlawful actions in the patriotic habiliments of "national security," it did not work. *Nixon v. Sirica,* 159 U.S. App. D.C. 58, 487 F.2d 700 (1973). It should not work in the case at bar and, in any

event, the President was dismissed as a defendant below and is not a party to the case, and Judge Gasch in the District Court and the Court of Appeals cannot possibly mean that the Secretary of Defense has some foreign relations powers under the Constitution. In short, both the District Court and the Court of Appeals aimed at the wrong target, and this aberration presents a special and important reason for this Court to grant petitioner a writ of certiorari.

For the above reasons, it is respectfully requested that this petition be granted.

Respectfully submitted,

ALBERT A. RAPOPORT

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Attorney for Petitioner

APPENDIX A

NOT TO BE PUBLISHED – SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1606

September Term, 1975
74-1033 Civil

Michael J. Bennett, Appellant
v.
Secretary of Defense

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
FILED: June 10, 1976
GEORGE A. FISHER
Clerk

***Appeal from* the United States District Court for the District of Columbia.**

Before: TAMM and WILKEY, Circuit Judges and CHRISTENSEN,*
United States Senior District Judge for the District of Utah

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby affirmed. See Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3501 (U.S. March 8, 1976).

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

* Sitting by designation pursuant to 28 U.S.C. § 294(d)

FILED
APR. 25, 1975
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL J. BENNET,)
Plaintiff,)
)
v.) Civil Action
) No. 74-1033
SECRETARY OF DEFENSE,)
Defendant.)

MEMORANDUM-ORDER

Plaintiff herein seeks to enjoin the defendant Secretary of Defense from providing funds to Israel under the Emergency Security Assistance Act of 1973 (Public Law 93-199, 87 Stat. 836). Plaintiff asserts that the Act in question is an unconstitutional violation of the First Amendment to the United States Constitution since it permits the United States to contribute to the support of a theocratic state. He requests that a statutory three-judge court be convened and that it declare the Act to be unconstitutional and grant an injunction against the operation of the Act. The matter is now before the Court on defendant's motion to dismiss.[1]

---

[1] Defendant points out that a three-judge court need not be convened if this Court lacks the power to adjudicate a claim. The Court agrees. See Gonzales v. Automatic Employees Credit Union, No. 73-858 (U.S. Decided Dec. 10, 1974).

(A) Standing.

Defendant urges that plaintiff lacks standing in this case because he points to no injury in fact. Plaintiff replies that he is squarely within the rule of Flast v. Cohen[2] since he seeks to rely on the first clause of the First Amendment as a specific prohibition against the Act, which is an expenditure under Article I, Sec. 8 of the Constitution. It is patently clear that neither Flast nor any other case was intended to obviate the requirement that a plaintiff be able to show specific injury or an immediate danger thereof. United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974); Laird v. Tatum, 408 U.S. 1 (1972); Sierra Club v. Morton, 405 U.S. 727 (1972). Flast itself noted that the gist of standing was whether a party had such a personal stake in the issue that concreteness is assured. 392 U.S. at 99.

In Flast, the personal stake of the plaintiffs was obvious: improper use of Federal funds to aid religious schools impinged on the religious freedom of every American. No such threat exists here. Indeed, plaintiff can point to no danger to his rights or liberties by the provision of military aid to Israel. The Court itself can conceive of no such threat or injury. Since there is no injury personal to plaintiff in this case, no standing exists.

---

[2] 392 U.S. 83 (1968).

(B) Political Question.

The Act challenged here was part of the American response to the so-called Yom Kippur War of 1973. See S. Rep. No. 93-657, 93d Cong. 1st Sess. (1973); H.R. Rep. No. 93-702, 93d Cong. 1st Sess. (1973). In the course of committee consideration of the Act, the Secretary of State, Deputy Secretary of State, Deputy Secretary of Defense and the Chairman of the Joint Chiefs of Staff appeared as witnesses. Id. All stressed that the Act was a response to the recent Yom Kippur War and the Soviet role in the war and its aftermath. All obviously regarded the Act as important to the continuing role of the United States in the Middle East. Id. The Senate Foreign Relations Committee, moreover, felt that the Act would even influence ". . . the continuation of the Soviet-American detente. . . ." S. Rep. No. 93-657, supra, at 5.

This Act, then, is closely bound up with several delicate areas of American foreign policy. Foreign policy questions have long been regarded as political matters committed to the care of the political branches. See generally, e.g., Detjen v. Central Leather Co., 246 U.S. 297, 302 (1918; United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319-20 (1936); Indeed, cases involving foreign relations furnish prime examples of political questions. See Baker v. Carr, 369 U.S. 186, 210-11, 217 (1962) (characteristics of a political question). The Court has no doubt that this case presents a non-judiciable political question which cannot be resolved by the Courts.

(C) Mootness.

Neither of the parties herein explored the mootness issue. The Act in question, however, authorized expenditures only through June 30, 1974. As that date is now long past, the Court can only conclude that the case is now moot.

Accordingly, it is by the Court this 24th day of April, 1975,

ORDERED that this case be, and it hereby is, dismissed since plaintiff lacks standing, the question presented is a political one not justiciable by this Court and the case is moot.

/s/ Oliver Gasch
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL J. BENNETT
750 Hallowell Drive
Huntingdon Valley, Pennsylvania 19006

Plaintiff,

v.

SECRETARY OF DEFENSE
The Pentagon
Washington, D.C. 20301

Defendants.

Civil Action
No. 74-1033

JUL 10, 1974

JURY TRIAL
DEMANDED

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

1. This action arises under the Constitution of the United States, Article I, Section 8; the First Amendment to the Constitution of the United States; and the Emergency Security Assistance Act of 1973, the Act of December 26, 1973, Public Law 93-199, 87 Stat. 836, 837 (Exhibit A hereto), as hereinafter more fully appears. The jurisdiction of this court is founded on the above constitutional and statutory provisions and on 28 U.S.C. 1331, 2201, 2202 and 2282. The matter in controversy exceeds the sum of ten thousand dollars ($10,000.00), exclusive of interest and costs.

2. Plaintiff is a citizen of the United States and federal taxpayer and is required under Acts of Congress and has and does in fact pay taxes to the federal government in substantial sums, including taxes paid at all times material to this litigation. Defendant is the duly appointed and acting Secretary of Defense as provided by Congress in 10 U.S.C. 133, to whom the President has delegated by executive

orders various functions including administration of Public Law 93-199.

3. Defendant is unconstitutionally expending federal funds committed under the Emergency Security Assistance Act of 1973 (Pub. Law 93-199, Act of Dec. 26, 1973) to provide military assistance and foreign military sales credits to Israel, a theocracy, which tightly regulates religious beliefs, requires a religious test for citizenship and civil rights of not only its citizens but others including plaintiff as a precondition to state protection, and invidiously discriminates between religions, and penalizes and discriminates against individuals and groups because they hold religious views abhorrent to Israeli authorities.

4. The Emergency Assistance Act of 1973 is an unconstitutional exercise by Congress of its power to legislate under the taxing and spending clause of Article I, Section 8 of the Constitution in that Congress has authorized a substantial expenditure of federal funds in the amount of $2.2 billion during fiscal year 1974 for the theocratic State of Israel (Exhibit B hereto) in violation of the First Amendment which provides that "Congress shall make no law respecting an establishment of religion . . .".

5. As a result, plaintiff alleges and verily believes that his tax money is being extracted and spent in violation of specific constitutional protections against Congress using the taxing and spending clause in derogation of the establishment clause, which operates as a restriction on the exercise of the taxing and spending power.

6. Plaintiff taxpayer has a clear and substantial stake in the outcome of this litigation, and alleges that he is a proper and appropriate party to invoke the court's jurisdiction in this action in order to protect himself and other

taxpayers similarly situated from the financial injury resulting from misapplication of federal tax funds by defendant under the Emergency Security Assistance Act of 1973.

WHEREFORE, plaintiff requests the court:

1. To enjoin defendant from expending funds under the Emergency Security Assistance Act of 1973; and

2. To enter a judgment declaring that said Act is unconstitutional for the reasons set out hereinabove.

Respectfully submitted,

/s/ Albert A. Rapoport

Albert A. Rapoport
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(202) 783-1647

VERIFICATION

Michael J. Bennett, upon oath, swears and affirms that he verily believes that the facts stated in the complaint to be true.

/s/ Michael J. Bennett

Michael J. Bennett

Subscribed and sworn to before me this 1st day of July, 1974.

/s/ Regina Anne Dougherty

Regina Anne Dougherty
Notary Public
Ambler, Montgomery County, Pa.
My Commission Expires Sept. 15, 1975

* * * Public Law 93-199 * * *
93rd Congress, H.R. 11088
December 26, 1973

AN ACT

To provide emergency security assistance authorizations for Israel and Cambodia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Emergency Security Assistance Act of 1973".

Sec. 2. In addition to such amounts as may be otherwise authorized to be appropriated to the President for security assistance for the fiscal year 1974, there are hereby authorized to be appropriated to the President not to exceed $2,200,000,000 for emergency military assistance or foreign military sales credits, or for both as the President may determine, for Israel, of which sum amounts in excess of $1,500,000,000 may be used pursuant to this section or section 4 of this Act only if the President (1) determines it to be important to our national interest that Israel receive assistance hereunder exceeding $1,500,000,000, and (2) reports to Congress each such determination (if more than one) at least twenty days prior to date on which funds are obligated or expended under this Act in excess of such $1,500,000,000 limitation. The twenty-day requirement contained in the preceding sentence shall not apply if hostilities are renewed in the Middle East. The President shall include in his report the amount of funds to be used

pursuant to the determination, the terms of the additional assistance under section 2 or section 4, and the justification for the determination. All information contained in the justification shall be public information except to the extent that the President concludes that publication would be incompatible with the security interests of the United States.

Sec. 3. Military assistance furnished out of funds appropriated under section 2 of this Act shall be furnished in accordance with all of the provisions applicable to military assistance under the Foreign Assistance Act of 1961 (75 Stat. 424; Public Law 87-195), as amended. Foreign military sales credits extended to Israel out of such funds shall be provided on such terms and conditions as the President may determine and without regard to the provisions of the Foreign Military Sales Act (82 Stat. 1320; Public Law 90-629), as amended.

Sec. 4. At any time prior to June 30, 1974, the President is hereby authorized, within the limits of funds appropriated under section 2 of this Act for Israel, to release Israel from its contractual liability to pay for defense articles and defense services purchased or financed under the said Foreign Military Sales Act or under this Act during the period beginning October 6, 1973, and ending June 30, 1974, and such funds shall be used to reimburse current applicable appropriations, funds, and accounts of the Department of Defense for the value of such defense articles and defense services.

Sec. 5. The Secretary of Defense shall conduct a study of the 1973 Arab-Israeli conflict to ascertain the effectiveness of the foreign military assistance program as it relates to the Middle East conflict, including weapons that the United States is providing to Israel through foreign assistance programs, and to compare them to the effectiveness of the weapons which the Soviet Union is providing to the Arab States. In conducting such study and submitting such report, the Secretary shall take care not to disclose, directly or indirectly, intelligence sources or methods or confidential information received from any other nation. A report of the conclusions of such study shall be submitted to the Congress as soon as practical and in any case not later than December 31, 1974.

Sec. 6. Of the funds appropriated pursuant to section 2, the President may use such sums as may be necessary from time to time for payment by the United States of its share of the expense of the United Nations Emergency Force in the Middle East, as apportioned by the United Nations in accordance with article 17 of the United Nations Charter.

Approved December 26, 1973.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 93-707 (Comm. on Foreign Affairs).
SENATE REPORT No. 93-657 (Comm. on Foreign Relations).
CONGRESSIONAL RECORD, Vol. 119 (1973):
Dec. 11, considered and passed House.
Dec. 20, considered and passed Senate.

APPENDIX B

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Rabbi Elmer Berger, being first sworn upon oath, depose and state that I was ordained as a Rabbi of the Hebrew Union College of Cincinnati in 1932; that I have a bachelor's degree from the University of Cincinnati; that from 1943 to 1968 I served as operating head of the American Council for Judaism, and that from 1968 until the present I have been president of American Jewish Alternatives to Zionism. I have written several books relating to Zionism and contributed numerous articles on that subject to periodicals, including the Encyclopedia Brittanica. I have studied the activities of The World Zionist Organization and the Jewish Agency for Israel, and I am thoroughly familiar with the Status Law enacted in 1952 by the Israeli Knesset or Parliament, as well as the 1954 covenant signed by the State of Israel and the World Zionist Organization establishing a juridical relationship. In my opinion, based on a lifetime of study and experience, the political State of Israel is a theocracy, imposing a religious test on all who may become accepted as members of "the Jewish People," and that the criterion for full or first class citizenship in the State of Israel is a religious test, and that Israel, as now constituted, is a theocracy based on an establishment of religion.

/s/ Rabbi Elmer Berger
Rabbi Elmer Berger

Subscribed and sworn to before me this 26th day of June 1974.

SEAL
* * *

/s/ Adele Huff
Adele Huff